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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 979

KEENER RUBBER, INC.,
Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION OF KEENER RUBBER, INC., For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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PETITION OF KEENER RUBBER, INC., For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Keener Rubber, Inc. (herein called "Petitioner" or the "Company") prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Sixth Circuit entered January 27, 1964, which affirmed an order of the National Labor Relations Board against Keener Rubber, Inc.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 326 F. 2d, 968 and is included in the appendix to this petition, *infra*, pages 31-34. The Decision and Order of the Board issued September 17, 1962 (App.* 144a-148a) is reported at 138 N. L. R. B., 613. The Supplemental Decision and Order issued June 4, 1963 (App. 224a-251a) is reported at 142 N. L. R. B., No. 102. The Hearing Officer's Report on

* "App." refers to the Appendix to the Brief of Petitioner filed in the Court of Appeals.

Challenges, issued August 25, 1961; and the Board's Supplemental Decision of Certification of Representation, issued March 8, 1962 (App. 115a, 124a) have not been reported.

JURISDICTION.

The decree of the Court of Appeals was entered on January 27, 1964. The jurisdiction of this Court is invoked under Section 10(e) of the National Labor Relations Act, as amended, and under 28 U. S. C., 1254(1).

QUESTION PRESENTED.

Where an employee on the afternoon shift merely relays directions and orders from the department foreman to other employees but has no responsibility to see that such directions and orders are carried out nor any other responsibility for the operation of the department in which he works, and where such employee occasionally directs other employees to sweep the floors, take rest breaks, cut rubber during slack periods, or load trucks, but does not give any directions relating to production, and where such an employee receives an hourly rate of pay less than the rate paid to an employee on the day shift who admittedly is not a supervisor, and who performs the same job, does such an employee responsibly direct his fellow employees in a non-routine manner using independent judgment so as to be classified a supervisor within the meaning of Section 2(11) of the National Labor Relations Act?

The Petitioner says this question should be answered "No."

STATUTE INVOLVED.

The pertinent provision of the National Labor Relations Act is Section 2(11) (61 Stat. 137; 29 U. S. C., 152 (11)), which provides:

> "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

STATEMENT.

(a) Proceedings Before the Board and Court of Appeals.

On May 5, 1961, Lodge 2222, of the International Association of Machinists, AFL-CIO (hereinafter referred to as the "Union") filed a Representation Petition (App. 3a) stating its desire to be certified as the exclusive representative for the production and maintenance employees at Petitioner's plant. Pursuant to a Stipulation for Certification upon Consent Election (App. 4a) an election was conducted on May 26, 1961. The tally of ballots (App. 6a) indicated that of 38 eligible votes, 19 were cast for the Union, 18 were against the Union and 1 ballot was challenged by the Union. The challenge thus was determinative of the election. The challenge was to the ballot of William Mowen, who the Union claimed was a supervisor and not entitled to vote.

On August 3, 1961, a hearing was held to resolve the challenge. The Hearing Officer found that Mowen did *not* possess the authority to hire, fire, layoff, recall, promote or discharge employees; nor could he effectively recom-

mend such action. He did find, however, that Mowen responsibly directed employees in the performance of their work in a non-routine manner, and *on that basis alone* concluded Mowen was a supervisor within the meaning of Section 2(11) of the Act and that his ballot should not be counted (App. 122a, 123a).

The Board concurred with the Hearing Officer and certified the Union (App. 144a).

The Union thereupon requested Petitioner to recognize the Union and to commence negotiations, but the Petitioner refused on the basis that the alleged certification was erroneous. The Union then filed with the Board an unfair labor practice charge against Petitioner and the Board issued its Complaint (App. 127a, 128a).

Following the hearing on this Complaint the Trial Examiner issued his Intermediate Report in which he concluded that the Union was duly certified as the bargaining representative and that by refusing to bargain with the Union, the Petitioner engaged in an unfair labor practice. On September 17, 1962, the Board adopted the findings, conclusions and recommendations of its Trial Examiner (App. 148a), which Decision and Order was subsequently enforced by the Court below when it denied Petitioner's petition to review and set aside said Order.

(b) Description of Company's Operations.

The Petitioner is a small rubber band manufacturer, located in Alliance, Ohio. Its plant occupies only 16,000 square feet of floor space, including the offices (App. 94a).

The manufacture of rubber bands is a relatively simple thing. There are only two production departments. The first of these is known as the "mill room" and is the department involved in this case. The first operation consists of the mixing of crude rubber and chemicals. This is

performed by a "mix-man." The product then goes to a warm-up mill where the product literally is warmed up preparatory for the next operation. The evidence is undisputed that this is the most critical operation in the entire production process. The operator of the warm-up mill is usually called the "warm-up man." It was this position that Mowen held (App. 81a, 86a, 98a, 99a).

After the product passes through the warm-up mill it goes to tubers which extrude it into tubes. The tubes are placed on poles (by "polers") who then place the poles and tubes in a vulcanizer to be cured. When they are removed from the vulcanizer the tubes are stripped from the poles, weighed and recorded by the "vulcanizing man" and then transported to the "bandroom" which is the second production department (App. 81a, 82a).

The bandroom is not involved in this case, but, as a matter of information, in the bandroom the tubes are sliced into rubber bands, packaged and shipped (App. 82a).

The mill room operated on the following shifts: The "first" shift, or day shift, which operated from 6:30 a.m. to 2:30 p.m., on which there were 11 employees; the "second" shift, or afternoon shift, which operated from 2:30 p.m. to 10:30 p.m., on which there were 10 employees; and the "third" shift, or night shift, from 10:30 p.m. to 6:30 a.m., on which there were 2 employees (both "mix-men") (App. 80a, 88a).

The Company employed a total of 42 persons. In addition to the 38 employees who voted in the election there were the following:

1. Kenneth B. Miller, President, who was in charge of the entire operation;
2. Orley Herron, the Vice President, who was in charge of sales;

3. Spencer ("Bud") Bedford, the mill room foreman, who was in charge of the mill room department;
4. Roy Kannal, the bandroom foreman, who was in charge of the bandroom department. (App. 82a, 95a, 96a.)

Miller normally was at the plant from 8:30 a.m. to 5:00 p.m. His normal workday thus overlapped the second shift by 2½ hours. He was also at the plant 3 or 4 nights per week at which time employees were free to and did discuss production problems with him (App. 100a).

Bedford's normal hours were from 6:30 or 7:00 a.m. to 2:30 or 3:00 p.m. He was at the plant for 2 to 5 nights per week, each time for a period ranging from 10 minutes to 2 hours. He lived approximately 5 miles away from the plant and normally was available by telephone (App. 80a, 82a, 83a, 90a).

The second shift operated in this fashion: Bedford did the hiring, firing, laying off, recalling, etc. He scheduled the work. The schedules were posted on a bulletin board and the employees on the second shift looked to the bulletin board to find out what work they were to perform each afternoon. Bedford checked the production records, which were kept by the vulcanizing man. He made changes in the schedule if necessary. His standing orders were that if the employees finished the work for any particular day before the end of the shift, they were to go to the next day's work. They were to telephone him if anything went wrong (App. 46a, 56a, 57a, 77a, 80a, 81a, 82a, 87a, 90a, 92a).

When Bedford had any special instructions to be given they were relayed through one of the second shift employees. Usually this was Mowen but such was not always the case (App. 84a).

At the time of the election (May 26, 1961) and for some 9 months prior thereto Mowen had been the warm-up man on the second shift (there is only 1 warm-up man per shift) (App. 86a, 55a, 98a). As we pointed out above, *this is the most critical production job*. If the warm-up man doesn't perform his function, the entire production operation stops. If the product is not properly warmed up, the tubes are not extruded properly and poor quality production results. The warm-up mill requires almost constant attention and as a result Mowen spends 90% of his time at the mill (App. 55a, 65a, 81a, 99a).

Because of the critical nature of the job, and because of the constant attention required, this job is paid the highest rate in the plant (except for the actual supervisory jobs). For the job, Mowen received $2.26 per hour, plus a 4¢ per hour shift differential. John Wyss, who had the comparable job on the day shift, received $2.28 per hour, and, of course, no shift differential. It is undisputed that Wyss is not a supervisor (App. 98a, 99a, 123a).

The next highest paid job was that of poler. The poler received $2.11 per hour (App. 99a).

Bedford, the mill room foreman, was hourly paid; he received $2.75 per hour (App. 99a).

(c) The Evidence of Mowen's Authority Responsibly to Direct.

This brings us to the narrow issue involved in this case: Did Mowen have authority responsibly to direct other employees, in a way not of a merely routine or clerical nature but requiring the use of independent judgment, within the meaning of Section 2(11) of the Act? The Petitioner contends that while he may have directed other employees he did not *responsibly* direct; his direction was

of a *routine* nature; it did not require the use of independent judgment.

The only evidence of direction of any kind (whether "responsibly" or otherwise) is the following:

1. John Farmer testified that Mowen asked him to work overtime (App. 18a).

2. Phyllis Kannal testified that Mowen told someone to relieve her at coffee break or lunch time and that he told employees to do different jobs. She last worked for Petitioner on September 2, 1960. The election was held on May 26, 1961 (App. 24a and 25a).

3. Larry Baum testified that Mowen "tells us what to do and how to do the job" and that Mowen gave instructions to Beulah Jones and Baum on the Number 2 Tuber (App. 33a). The Hearing Officer discredited Baum (App. 119a). A. Norman Somers, the Trial Examiner who issued the Supplemental Intermediate Report, "* * * discredited all controverted testimony which Larry Baum had given" (App. 228a).

4. Corwin Nichols testified that Mowen told him where to eat lunch, not to use the phone, when to take a rest break, to sweep floors, to cut rubber and to work overtime (App. 40a-49a). But the testimony of Kenneth Miller and Spencer Bedford, Petitioner's President and Foreman respectively, that all of these directions were performed on their express order and direction is not disputed or controverted (App. 62a, 84a, 89a, 103a).

5. Dave Milburn testified that 4 or 5 days before the hearing held on August 3, 1961, Mowen said that Milburn "should take my half of the truck" (App.

52a). (The above five witnesses were bargaining unit employees.)

6. Mowen, Miller and Bedford testified that Mowen conveyed certain orders and directions, *but acted only as a conduit, without responsibility for seeing that the orders were carried out* (App. 58a, 65a, 84a, 87a, 100a, 101a).

The only evidence as to Mowen's authority *responsibly* to direct is the testimony of Miller, Bedford and Mowen. Miller testified that Mowen had never been given any authority as a supervisor and more specifically that he had no authority to direct other employees where it involved the use of any independent judgment (App. 100a). Bedford testified that Mowen was not "held responsible in any way." He only had the right to direct employees in connection with "specific things that I [Bedford] told him to tell them to do" (App. 84a).

This testimony of Miller and Bedford was not contradicted or disputed. It was not discredited by the Hearing Officer.

Mowen himself testified that the only direction he performed was when he relayed orders of Bedford (App. 58a, et seq.). Curiously enough the Hearing Officer discredited this testimony because he felt:

> "* * * that Mowen made an attempt to convey the impression that he was merely a conduit in relaying orders from Bedford and Miller to other employees." (App. 120a.)

He was discredited because he told the truth! But regardless of whether he should or should not have been credited the fact remains that the testimony of Miller and Bedford (as well as the testimony of Mowen) as to the authority *responsibly* to direct is not controverted, disputed or overcome in any way.

(d) Conclusions of the Hearing Officer.

As a result of the evidence presented at this hearing, the Hearing Officer, in his Report on Challenge, found that Mowen did not possess the usual attributes of a supervisor, i.e., the authority to hire, fire, layoff, recall, promote or discharge employees nor could he effectively recommend such action. He found, however, that Mowen "responsibly directs employees in the performance of their work in a non-routine manner" and he, therefore, concluded that Mowen was a supervisor (App. 115a).

Before going further in this brief we want to make our position clear. We feel that the Findings made by the Board and by the Court of Appeals were not supported by the evidence considered as a whole. But what is more important: Even *accepting as factually correct all of those Findings*, it is our position that *Mowen was nothing more than a "straw boss" or "lead man."* He was not a supervisor within the meaning of the Act.

SPECIFICATIONS OF ERROR TO BE URGED.

1. The Court of Appeals erred in holding that Mowen responsibly directed employees on the second shift within the meaning of the term "responsibly to direct" as set forth in Section 2(11) of the National Labor Relations Act.

2. The holding of the Court of Appeals that Mowen was a supervisor is in conflict with the decisions of other United States Courts of Appeals which have ruled upon similar issues.

3. The Court of Appeals erred in upholding the Board's finding that Mowen responsibly directed other employees in that said finding was not supported by the evidence considered as a whole.

REASONS FOR GRANTING THE WRIT.

1. The Decision of the Court Below Is in Conflict With the Decisions in Like Cases Arising Before Other United States Courts of Appeals.

The sole issue that was presented in this case was whether or not Mowen had the authority responsibly to direct other employees in a nonroutine manner and in a way requiring the use of independent judgment. This was the only attribute of supervisory authority under Section 2(11) of the Act which Mowen was found to have possessed. The question of what constitutes responsible direction often has arisen before the Courts of Appeals. The decision of the Sixth Circuit in this case is directly in conflict with the decisions of other Circuits which have considered and passed upon this question.

First, it is in conflict with the decision of the United States Court of Appeals for the Second Circuit in *Precision Fabricators vs. N. L. R. B.*, 204 Fed. 2d 567 (2nd Cir., 1953). The first question in that case was whether the employee at the time of his discharge was a supervisor as defined by the Act. In finding he was merely a leadman and, therefore, not a supervisor, the Court said:

> "The question is essentially one of fact, the answer to which must turn on what powers Petti was authorized to exercise. He was employed in the steel rule die department of the employer's plant from March 1947 until his discharge on August 22, 1951. He testified that at least 80% of his time was spent in actually operating machines. The petitioner contends that in addition to operating machines Petti had the supervisory duty to 'assign' the work to be done by the other employees in the department. Mr. Bishop, the production manager, testified that he would give Petti a 'production list' and 'orders' from one to three

> times a week. The list would contain 'the customers' names, the parts that were to be run, and what date was on the schedule that we had to meet to satisfy the customer.' Petti himself testified 'Everything that I did or the employees was [sic] supposed to do, I did by Mr. Bishop's information to me.' The Trial Examiner on the entire record found 'that though Petti may have assigned work to other employees, whatever authority he exercised was of a routine nature pursuant to Bishop's direction and that he was not a supervisor within the meaning of the Act.' We agree with this conclusion. Petti did no more than to keep all hands busy on the work given him by Mr. Bishop. When an employee finished a job, she would ask Petti what to do next. We will assume that he was the room 'boss' or 'leadman,' but the discretion given him appears to be 'routine' in the natural sense of that word. As Judge Magruder said in National Labor Relations Board v. Quincy Steel Cast. Co., 1 Cir., 200 F. 2d 293, 296: 'The legislative history of § 2(11) tends to support the Board's view that certain employees with minor supervisory duties, such as straw bosses and leadmen, were not intended to be excluded from the coverage of the Act.'"

The similarity of the above fact situation to the one before the Court below is readily apparent. When Mowen asked an employee to sweep up or to cut rubber during a slack period he was doing "no more than to keep all hands busy." Moreover, the alleged discretion given Mowen as to sweeping up, cutting rubber, or loading trucks "appears to be routine in the natural sense of that word."

Thus, with a factual situation that was analogous, the Court of Appeals for the Second Circuit arrived at a result different from that reached in the present case. The criteria applied by it were not the same criteria applied by the Court below.

Another quite similar factual situation but a conflicting decision may be found in *N. L. R. B. vs. North Carolina Granite Corp.*, 201 Fed. 2d, 469 (4th Cir. 1953). That case arose on a petition for enforcement of an order of the Board directing the employer to bargain with the union. The Board, as in the present case, had found that the employee whose ballot was challenged was a supervisor and not entitled to vote. The Fourth Circuit held that the evidence was *insufficient* to sustain the finding of the Board. The Court found that the employee whose vote would determine the outcome of the election worked with two other carpenters on a repair squad repairing the company's building and the houses in which the employees lived and was no more than the lead hand of the squad which operated under the direct supervision of the company's superintendent. This individual kept the time of himself and the men who were working with him. Furthermore, he had no power to employ or discharge those who were working with him or to reward or discipline them or to exercise any authority over them except such routine authority over minor matters as would ordinarily pertain to the leader of such a squad. The Court said:

> "It is perfectly clear from the evidence that his position was not that of a representative of management with power to responsibly direct laborers working under him but that of a laborer occupying the position of lead hand or straw boss.
>
> "It was never intended by the Labor Management Relations Act that a laborer exercising no more authority than Wilson be denied the benefits of the act or excluded from participating in the choice of a bargaining representative for the employees; * * *."

Although the facts in the case of *N. L. R. B. vs. Fullerton Publishing Co.*, 283 Fed. 2d, 545 (9th Cir., 1960), dif-

fer substantially from the facts presented herein and the outcome also differs, we feel it is important to refer to a portion of the opinion as the principles expressed therein are clearly in conflict with those applied by the Court below. On page 549, it is said:

> "In our view, if a newspaper editor is given power or authority to direct or assign his reporter subordinates in the performance of their reportorial duties, and in turn is held answerable for the performance of his reporters in the extent and scope of coverage of news that he puts in his section of the paper, such direction is responsible direction and the editor is a supervisor. On the other hand, whenever the direction exercised has merely been that of relaying general orders to specific individuals, courts have held that the activity involved has not been sufficient to constitute responsible direction.
>
> "* * *
>
> "In our view, if the editors are nothing more than leadmen, making assignments solely or primarily because of their seniority, and not held fully accountable for their department's performance as to the choice of news coverage effected by that department, such direction is not responsible direction and such editors are not supervisors."

The above is analogous to the present situation. Mowen is not held accountable or responsible for any function of the second shift. There is no evidence whatsoever that Mowen does have any such responsibility. To the contrary, the only evidence in the record are statements of Mowen, Miller and Bedford that Mowen *does not have* any such responsibility.

In *N. L. R. B. vs. Whitehall Machine Works*, 204 Fed. 2d, 883 (5th Cir., 1953), the Court was concerned with whether or not the Assistant Supervisor of Statements

Division of the Accounting Department was improperly discharged. The Court found that the employee in question was an accountant who merely relayed orders from his supervisors and who gave no more than routine directions to the two female clerks who worked under him. This was so even though it was found that the employee's immediate supervisor was frequently absent from the office in the course of the day and sometimes for a whole day at a time, and during this time the employee in question had charge of the office. Thus, the fact that supervision was not present at all times was not a controlling and primary factor with the Fifth Circuit as it seemingly was with the Court below which stressed its finding that for approximately 75% of the time the second shift was operating Mowen was the only person present in the plant with any authority.

In *Poultry Enterprises vs. N. L. R. B.*, 216 Fed. 2d, 798 (5th Cir., 1954), the Fifth Circuit again was faced with the question of whether an employee was a supervisor. The evidence showed that the employee's primary duty was to main the company's trucks and machinery. He performed other manual work whenever needed. His rate was the same as that of the rank and file. The Court found that there was *no* evidence that he had power to hire and fire or to effectively recommend such action. There *was* evidence that he did transfer workers from place to place on the production line and told workers "what to do." On one occasion he excused a worker's absence and on another reprimanded an employee for poor performance. There was other testimony indicating that the assigning of work as to places on the line was merely routine, as the workers usually took their places automatically. The Court found that the Board's conclusion that this employee exercised independent judgment was based improp-

erly upon an inference from (1) the fact that the plant had 150 production employees and only one foreman, and (2) the statement by one witness that the recognized foreman told her that the employee in question would make a good boss and that he, the foreman, would stand behind him in anything he said. The Board relied mainly on the ratio between supervisors and production employees to infer that the employee's duties involved independent judgment and were not simply routine.

The Court said that there was utter inconsistency in the treatment of the testimony and facts by the Trial Examiner and Board. (In this respect the inconsistency of the Hearing Officer in the present case should be noted wherein he completely disregarded the testimony of Richard Willis. App. 75a-79a, 115a-124a.) The Court, therefore, concluded as follows:

> "Although the statute states various sorts of supervisory authority coupled by the disjunctive (*or*), it states the requirement of independence of judgment in the conjunctive (i.e., *in connection*) with what goes before. The only evidence in the record implying that Farmer may have had independent judgment is Hulsey's vague recollection of Nix's statement, which certainly was not remembered by Hulsey in temporal connection with Farmer's solicitations to sign the petition, and the ratio factor. There is positive testimony by Nix and Stewart that Farmer had no authority to exercise independent judgment. We believe that this did not constitute substantial evidence of this necessary element. It is not contrary to common sense or experience to suppose that Nix might have supervised this highly routine and automatic chicken packing operation, by moving around the plant frequently and by delegating some *routine* supervisory duties to Farmer and Howard, and in other cases using them as messengers. In any event Nix and Stewart swore that this was the case; certainly an in-

ference based on the Examiner's doubt that this could be so, should not be considered 'substantial evidence' by this Court. Nor can Nix's controverted and ambiguous statement (Farmer 'was going to' make a good boss), without its relevanc in point of time being shown, be considered substantial evidence."

There was no affirmative evidence in the above case of any recognition by management of the employee's supervisory status, except the testimony of one witness alleging that a management representative said that this employee would make a "good boss." This was comparable to the testimony of Mrs. Kannal in the case at bar which both the Board and the Court below relied upon, yet in *Poultry Enterprises* such testimony was not considered controlling by the Court.

In 1952 the First Circuit considered a finding that the employer had failed to bargain with the union in *N. L. R. B. vs. Quincy Steel Casting Co.*, 200 Fed. 2d, 293. The company contended that the union was improperly certified as a bargaining representative because of the finding that two of the company's employees were not supervisors within the meaning of the Act. The company had challenged the right of two employees, Green and Dunn, to vote on the ground that they were supervisors. Dunn was described as a "*coremaker and bench pouring* boss" and Green was described as a "*floor molder and assistant* foreman." The greater portion of Green's working time was spent as a regular production employee making large molds. Up until the day of the election, he was paid the regular union scale for molders. Three or four times a day there would be occasion to pour hot metal from ladles into molds. This pouring operation took from twenty minutes to half an hour. Green had charge of the immediate pouring operation, a task of coordination, telling fellow molders when to start and when to stop pouring.

While there was testimony that this pouring operation was difficult and dangerous and required the exercise of some judgment, Green testified that any of the skilled molders in the room was competent to handle the job. Dunn's situation was similar to that of Green. Dunn was hired as a coremaker and was paid the union scale for coremakers. Dunn occupied the same position of leadership in the pouring operation for small molds that Green did for larger molds. The Trial Examiner found that:

> "* * * the pouring operation is a routine matter and while as in practically every type of manufacturing process there is a safety factor involved, the duties performed by Green and Dunn in this connection are not of such character as render them supervisors but rather, at best, leadmen of the pouring crews."

The Court said that the legislative history of the Act supported the Board's view that employees with minor supervisory duties were not intended to be excluded from the coverage of the Act. Thus, the Court held that the two employees were not supervisors under the Act.

Finally, we would refer the Court to the recent case of *N. L. R. B. v. Lindsay Newspapers, Inc.*, 315 Fed. 2d, 709 (1963) which was decided by the Court of Appeals for the Fifth Circuit. This was a proceeding on a petition for enforcement of an order of the Board. One issue concerned therein was the supervisory status of an employee who had been discharged by the company. The Court in its opinion made the following statement about the employee in question:

> "We consider the facts which the Examiner could properly find from the evidence touching on Gulsby's activities in order to determine whether these facts could support the conclusion that Gulsby was not a supervisor. The facts which we believe the Examiner

could find on the evidence before him, and which were approved by the Board are that *Gulsby was at no time told by Arn, the Circulation Manager who was his admitted boss, or any other company official that he was a supervisor or that he had any specific authority on the one night a week he was "in charge" of the mail room.* Gulsby was in that position only on the day on which Linn, an admitted supervisor, was off duty. Gulsby did not have authority to hire or fire, to promote or reward employees or to lay off or recall them. The work performed in the mail room was routine in nature and each employee's job was fixed by a schedule made by others than Gulsby. *The employees in the mail room generally knew their jobs* and their assignments and they required little, if any, direction in the daily operations. Gulsby was not empowered to deviate from the schedule without calling Arn for authorization. Close check was kept by Arn and Linn on the work of the mail room on the night Gulsby was "in charge." Gulsby also performed all of his regular duties on the nights he was in charge. He was not paid a salary for his extra duties, but was paid on an hourly basis except that for part of the time he was given extra hours on the payroll which he may not have performed. *The other employees of the mail room were never informed that Gulsby was in charge or had supervisory duties."* (Emphasis added.)

Again, the similarity of the above with the case at bar is readily apparent (App. 18a, 77a, 84a, 100a, 104a), yet again the decision of the Fifth Circuit is in conflict with the decision of the Court below, for the Court of Appeals for the Fifth Circuit found that the evidence supported the finding that the employee, Gulsby, was not a supervisor.

The above cases graphically illustrate that the decision of the Court below is in direct conflict with the decisions

of Courts of Appeals for other circuits. In similar factual situations involving similar issues the courts differ as to result. This readily causes uncertainty and confusion in this all-important field of labor-management relations. Because of the application of different criteria by different courts and because of the different decisions thereby resulting, this Petitioner respectfully contends that this Court should define this term and set forth guide lines to be followed.

2. This Honorable Court Has Not Considered the Term "Responsibly to Direct."

The decisions of the Circuit Courts discussed under the preceding heading of this Petition are only some of the Court decisions involving the question of what constitutes responsible direction. There are innumerable Board decisions on the same question. The volume of these decisions expresses better than words the importance of the meaning of this term in labor relations today. Today the distinction between an employee exercising *major* managerial powers (who falls within the definition of "supervisor" as used in the Act) and an employee with only *minor* managerial powers (who is protected by the Act) is a matter of critical importance.

The importance of this distinction was foreseen by the Senate Committee which conducted hearings on the Labor-Management Relations Act. In its report it stated that it had distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees on the one hand and the supervisor vested with genuine management prerogatives on the other. S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 4.

When the Committee bill reached the floor of the Senate, Senator Flanders proposed that the definition of

"supervisor" be amended to include among the major attributes of supervision the power "responsibly to direct" the work of others. He proposed the amendment to correct what he regarded as a deficiency in the Committee definition which could permit actual foremen to be accorded the status of employees under the Act. He stated:

> "In fact, under some modern management methods the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be done next and who shall do it. He gives instructions for his proper performance. If needed, he gives training in the performance of unfamiliar tasks to the workers to whom they are assigned.
>
> "Such men are above the grade of 'straw bosses, leadmen, set-up men, and other minor supervisory employees' as enumerated in the report. Their essential managerial duties are best defined by the words 'direct responsibility,' which I am suggesting." (93 Cong. Rec., 4677-4678.)

Senator Flanders' clarifying amendment was adopted virtually without debate.

It is almost impossible to believe that this Honorable Court has not had occasion to pass upon the meaning or application of the term "responsibly to direct" but such is the case. The meaning and application of this term has become an important question of Federal Law which has not been, but should be, settled by this Court.

The Sixth Circuit was one of the first, if not the first, Court of Appeals called upon to interpret this part of the Labor-Management Relations Act. The occasion was *Ohio*

Power Company vs. N. L. R. B., 176 Fed. 2d, 385 (1949). In that case the Court held in favor of the company and the Board filed a petition for a writ of certiorari with this Court (Case Number 413, October Term 1949). The respondent in that case opposed the petition on the ground that the factual situation involved there was a highly novel and unusual situation, of a private and local nature. The petition was disallowed. Much water has gone over the dam since that time, however. The many Court and Board decisions since that time demonstrate that the factual situation involved in the case at bar is not novel and unusual. It is not of a private and local nature. It involves an important question of Federal Law which should be settled by this Honorable Court.

3. The Court Below Erred in That There Is Not Substantial Evidence in the Record as a Whole to Support the Board's Conclusion That Mowen Was a Supervisor.

This Petitioner is, of course, cognizant of the general rule that credibility resolutions by the trier of fact are not usually to be disturbed by the reviewing court. With this we cannot and do not disagree. The rule which is controlling in this case concerns the requirement that the Board's Decision must be supported by substantial evidence when viewing the record as a whole. *Universal Camera Corp. vs. N. L. R. B.*, 340 U. S., 474, 71 S. Ct., 456, where this Court said:

> "The substantiality of evidence must take into account whatever in the record clearly detracts from its weight * * * The Board's findings are entitled to respect; but must nonetheless be set aside when the record before the Court of Appeals clearly precludes the Board's Decision from being justified by a fair estimate of the worth of witnesses * * *." 71 S. Ct., 464, 466.

Thus, it was incumbent upon the Court of Appeals to consider the conflicting evidence and pass upon its weight.

The Hearing Officer found simply that "Mowen responsibly directs in a nonroutine manner the employees on the second shift." The Hearing Officer did not set forth or explain the manner in which Mowen allegedly responsibly directs nor did he list any of Mowen's functions or activities which allegedly constitute responsible direction. He seemingly had four reasons for his generalization: (1) the fact that Mowen and Jack Hammel were transferred the same day; (2) the testimony of Phyllis Kannal that the Company's President said Mowen would replace Hammel; (3) the assertion that the employees look upon Mowen as foreman; and (4) the alleged fact that there was no supervision on the second shift 75% of the time (App. 123a).

The Court of Appeals, in ruling that the finding that Mowen responsibly directed employees was not an abuse of discretion on the part of the Board and was supported by the evidence considered as a whole, referred in its Opinion primarily to these same four factors.

In detail, the first of the four reasons advanced by the Hearing Officer is this: Prior to June of 1960 Mowen, Hammel and a third employee were rotated on the second shift. In June of 1960 Hammel was made a supervisor on the second shift *and a notice was posted to that effect* (App. 97a). He also worked as a poler on the second shift and received the rate of $2.26 per hour. It will be recalled, however, that the regular rate for a poler was $2.11 (App. 98a, 99a). Thus Hammel received a 15¢ bonus for acting as a foreman. Hammel was removed as a foreman on the second shift in August of 1960 because of complaints made about his conduct and at the same time Mowen was transferred from the first shift to the second shift (App. 97a,

98a). There is a dispute in the testimony as to whether or not Mowen first worked as a poler or as a warm-up man. This dispute is unimportant because there is no dispute about the fact that Mowen soon became a warm-up man and had been a warm-up man for something like nine months before the election was held (App. 36a, 86a, 98a).*

Miller and Bedford testified that Mowen was transferred to the second shift to take the place of another employee who was going away to school and that by then it had been determined that there was no need for any supervision on the second shift in addition to that supervision which Miller and Bedford afforded during their hours at the plant when the second shift was operating (App. 86a, 98a, 100a).

When Mowen was transferred to the second shift no notice was posted to the effect that he would be a foreman and the notice which had been posted about Hammel was removed (App. 104a).

Another factor which apparently influenced the Hearing Officer was the testimony of Phyllis Kannal that Miller told her that "Mowen would take over the foreman's job." Miller denied this. The Hearing Officer credited Kannal to the extent of finding that Miller told Kannal that Hammel would be removed and that "Mowen would replace him" (App. 118a). It is evident from a review of the record that Mrs. Kannal's use of the word "foreman" was directly attributable to the improper and leading questions of the Union's representative which were repeatedly objected to by counsel for the Petitioner (App. 23a). If

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* In its opinion the Court stated that "Mowen, upon replacing Hammel, received an increase to that received by Hammel." It overlooks the fact that Mowen soon became the regular warm-up man and that he was paid less than the warm-up man on the first shift.

Miller had told Mrs. Kannal that Mowen was to be the "leader" of the shift, or "boss," this would be entirely consistent with the Company's position herein. Thus if the single word "foreman" had not been used by Mrs. Kannal her testimony would not be at odds with the Company position. Therefore, it is evident that the leading questions of the Union representative were exceedingly prejudicial in this instance and directly caused the adverse implications attributed to Mrs. Kannal's testimony. However, even if Miller had made the statement attributed to him, this does not make Mowen a supervisor within the meaning of the Act. *N. L. R. B. vs. Quincy Steel Castings Company*, 200 Fed. 2d, 293, 296 (C.A. 1).

It must be recognized that the Hearing Officer could not have found this alleged statement to be of any substance. If he had, he would have found Mowen also had the authority to hire, fire, layoff, recall, promote or discharge and to effectively recommend such action. He did not make such a finding. He pointedly refused to find that Miller had used the word "foreman." He merely credited Mrs. Kannal to the extent that Miller told her Mowen would replace Hammel (App. 118a, 123a).

Even if Mowen replaced Hammel in August of 1960 it does not make Mowen a supervisor at the time of the Board election some nine months later. That was the critical time in this case. It is well recognized that to determine one's eligibility to vote, his status *as of the date of the election* must be determined, and in this case this can be done only by determining the *duties* Mowen performed *at the time of the election* and not some nine months before. We have analyzed in some detail the evidence as to Mowen's duties and the absence of any evidence of Mowen's authority responsibly to direct. This demonstrates

conclusively that regardless of whether or not he was originally transferred to this second shift to take the place of Hammel, at the time of the election he did not have the authority responsibly to direct other employees. Any inference that may be drawn from Mowen's transfer to the second shift cannot overcome the positive evidence in the record to the effect that he did not have such authority.

The third reason advanced by the Hearing Officer and the Court below was the assertion that employees looked upon Mowen as the foreman. The only evidence to support this is the following:

First, Larry Baum testified that Mowen said he was the "boss." This was denied by Mowen. The Hearing Officer credited Mowen—not Baum (App. 119a).

Secondly, Dave Milburn testified that he asked Mowen if he was "the boss" and he said he was (App. 52a). Mowen denied this (App. [illegible]). The Hearing Officer made no finding as to credibility but even if Mowen made such a statement it was not inconsistent with his being a "straw boss." It doesn't give him authority *responsibly* to direct.

As against this testimony there is the testimony of Richard Willis, a bargaining unit employee, who testified that he was told by Miller that he should take orders from Bedford (App. 77a).

Corwin Nichols, another bargaining unit employee, testified that the decisions as to what was needed and what was to be run came from Bedford (App. 46a, 50a).

Thus there is no substantial evidence in considering the record as a whole that the employees considered Mowen as a foreman or supervisor within the meaning of the Act. The most that can be said is that there is a slight amount of testimony that some considered him as "boss." Even if that testimony is fully credited and given the

greatest weight possible, it still doesn't make Mowen anything other than a "straw boss." It doesn't establish his authority *responsibly* to direct other employees.

The fourth point discussed by the Hearing Officer and the Court below was the alleged fact that there was no supervision on the second shift 75% of the time.

This simply is not factually correct. The shift in question started to work at 2:30 p.m. and quit at 10:30 p.m. Miller, the President, remained at the plant until 5:00 p.m. —a 2½ hour overlap. He returned to the plant 3 or 4 nights a week. Bedford was at the plant from 2 to 5 nights per week for periods ranging from 10 minutes to 2 hours. He was available by phone nearly all the time (App. 80a, 83a, 90a, 100a, 121a).

Thus, in fact, the second shift was without active supervision only a small part of the time. But even if it was without active supervision, this still does not make Mowen anything more than a "straw boss." There never has been any requirement that supervision be present, or that unless it is present a "straw boss" will be considered to be a supervisor. See *Valdese Mfg. Co.*, 115 N. L. R. B., 1256; *Dixie Wax Paper Co.*, 117 N. L. R. B., 548; *Kolcast Industries, Inc.*, 117 N. L. R. B., 418; *U. S. Gypsum Co.*, 118 N. L. R. B., 20. The Board's decision in this case is at complete odds with its decisions in analogous cases.

In regard to this issue, certain other factors should be remembered. First, all production was previously scheduled by Bedford and a schedule was placed on the bulletin board. Each employee knew what to do as a result of this schedule (App. 55a, 57a, 46a, 82a). Second, the shift was already running and, as Miller testified, it was much easier to continue a shift than to start up the machines in the morning (App. 96a). Thus, close supervision was not

needed. Third, Mowen was present to pass on orders from Bedford and Miller in their absence and, as it was phrased in *Precision Fabricators, Inc. vs. N. L. R. B., supra,* Mowen did no more than to "keep all hands busy." Fourth, as John Farmer said, "we all know our jobs" (App. 18a). It was not necessary to have immediate supervision always present, and if any problem should happen to arise the directions were to call Bedford (App. 18a, 57a). With the presence of Bedford and Miller and with the assistance of a "leadman" such as Mowen, the shift clearly received adequate supervision. Thus the finding that the shift was without supervision 75% of the time is not only fallacious but the facts as presented in the record refute the inference from this allegation that Mowen is a supervisor.

The Petitioner contends that there is no substantial evidence in viewing the record as a whole that William Mowen had authority "responsibly to direct" other employees. Since all the other supervisory attributes were lacking, if this attribute was also lacking Mowen was not a supervisor within the meaning of the National Labor Relations Act.

Under subheading c, of the STATEMENT, *supra,* we discussed in detail the evidence of Mowen's authority responsibly to direct. That evidence was not contradicted. Moreover, neither the Board nor the Court made any finding that Mowen was responsible in any way for the production on the second shift, either as to quality or quantity. The only evidence in the record is the undisputed testimony of Miller and Bedford that Mowen had no responsibility for the functioning of the second shift.

> "* * * It is settled law that where a witness' testimony is not contradicted, a trier has no right to refuse to

accept it." *N. L. R. B. vs. Ray Smith Transport Company*, 193 Fed. 2d, 142, 146 (CA 5).

There is no refutation of the fact that Bedford alone was responsible for what happened on that shift (App. 64a, 83a, 87a, 100a, 101a, 46a, 82a). Since Mowen was not answerable it cannot be said that he was a supervisor. *N. L. R. B. vs. Fullerton Publishing Company*, 283 Fed. 2d, 545, 549.

Even if all the statements of "facts" contained in the Opinion of the Court below and in the findings made by the Hearing Officer were correct, they do not make Mowen anything more than a "straw boss", without supervisory status. While the Board may have a certain amount of "informed discretion," it does not have discretion to change the law. When the only supervisory attribute claimed to be present is that of responsibly directing other employees, the Board has no discretion to find that responsibility exists where there is no evidence whatsoever to support such a finding.

CONCLUSION.

The questions raised by the decision below are of substantial public importance. It is of crucial importance in the labor-management relations field that the term "responsibly to direct" as this term is used in Section 2(11) of the National Labor Relations Act be defined by this Honorable Court and guide lines set forth for courts and the Board to follow so that the legislative intent of the Act will not be violated.

The decision of the Court below directly conflicts with the decisions of other United States Courts of Appeals on cases involving like fact situations and like issues. It is imperative that the confusion and uncertainty in this field

because of the application of different criteria by the various courts be corrected.

For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided January 27, 1964.)

Before: MILLER, Circuit Judge, LEVIN and KENT, District Judges.

PER CURIAM. Petitioner, Keener Rubber, Inc., seeks to review and set aside an order issued by the National Labor Relations Board which found that the petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, Section 158(a)(5) and (1), Title 29, United States Code, in refusing to bargain with the Union which had been certified as the exclusive representative of the employees in a unit appropriate for collective bargaining in petitioner's plant. The order directed the petitioner to cease and desist from the unfair labor practice found and, upon request, to bargain collectively with the Union. The Board, by its answer, seeks enforcement of the order.

In an election conducted among 38 employees in a stipulated unit at the petitioner's plant, 19 votes were cast for, and 18 against, representation by the Union. An additional ballot cast by William Mowen was challenged by the Union on the ground that Mowen was a supervisor as defined by Section 2 (11) of the Act, Section 152(11), Title 29, United States Code, and was ineligible to participate in the selection of a bargaining representative. The Board directed that a hearing be held to resolve this issue. The Hearing Officer found that Mowen responsibly directed employees in the performance of their work in a nonroutine manner and was thus a supervisor within the meaning of Section 2 (11) of the Act. The Board adopted

the finding of the Hearing Officer and certified the Union as the exclusive representative of the petitioner's employees. Thereafter, the Union requested the petitioner to meet with it and negotiate for a collective bargaining agreement. The petitioner refused to recognize and meet with the Union. On the basis of these facts the Board found that the petitioner had refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, and entered the order now under review.

The only question involved is the propriety of the finding that Mowen was a supervisor within the meaning of Section 2(11) of the Act. That section provides:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The petitioner operated its mill room with a full complement of employees on two shifts, the first shift between the hours of 6:30 A.M. and 2:30 P.M., and the second shift from 2:30 P.M. to 10:30 P.M. In August 1960 an employee named Hammel was working as foreman on the second shift. Hammel was relieved of his duties on the second shift and transferred to the first shift. Mowen was transferred from the first shift to replace Hammel on the second shift. Although Mowen was in charge of the second shift, petitioner contends he was merely a "straw boss" or "leadman" who directed the performance of routine jobs and through whom management sent and enforced its orders with respect to the operations of the second shift. Such an employee is not a supervisor within the meaning

of the Act. *Precision Fabricators, Inc. v. N. L. R. B.*, 204 F. (2) 567, 568-569, C. A. 2nd; *N. L. R. B. v. North Carolina Granite Corp.*, 201 F. (2) 469, 470, C. A. 4th; *N. L. R. B. v. Quincy Steel Casting Co.*, 200 F. (2) 293, 295-296, C. A. 1st.

The evidence fails to show that Mowen possessed the authority to hire, fire, lay off, recall, promote or discharge employees or that he could effectively recommend such action, but this does not prevent him from being classified as a supervisor if he qualified as such under other provisions of the statute. *Ohio Power Co. v. N. L. R. B.*, 176 F. (2) 385, 387, C. A. 6th, cert. denied, 338 U. S. 899.

We believe it is unnecessary to review in detail the duties performed by Mowen after his transfer to the second shift, except to point out that he was in charge of the second shift and performed general supervisory duties over the employees in that shift. Whether they were sufficient to constitute him more than a "straw boss" involves a question which is often difficult to determine, in the determination of which the Board necessarily has a large measure of informed discretion. *N. L. R. B. v. Swift and Company*, 292 F. (2) 561, 563, C. A. 1st.

It is admitted by petitioner that Mowen was one of three employees, including Hammel, who was considered for appointment as foreman of the second shift at the time Hammel was appointed; that Hammel served as foreman of the second shift from the time of his appointment on June 6, 1960, until he was replaced by Mowen on August 29, 1960; and that Mowen, upon replacing Hammel, received an increase in pay to that received by Hammel. There is evidence that the transfer of Hammel to the first shift was not because of any change in the operation of the second shift, but was because of friction between Hammel and a woman employee on the second shift; that

at the time the petitioner's president made the statement that Mowen would take over the foreman's job, although the making of this statement was denied by the president; that for approximately 75% of the time the second shift was operating Mowen was the only person present in the plant with any authority over a total of ten employees, who had less experience than those on the first shift who worked under constant supervision; and that the employees looked upon Mowen as the foreman from whom they received orders, instructions and directions.

Although some of the testimony is in sharp conflict and there are categorical denials on the part of the petitioner that Mowen was appointed foreman or performed the duties of a foreman on the second shift, the credibility of the witness is a matter for the Board. *United Fireworks Mfg. Co. v. N. L. R. B.*, 252 F. (2) 428, 430, C. A. 6th.

We are of the opinion that the finding that Mowen responsibly directed employees in the performance of their work in a nonroutine manner and was a supervisor within the meaning of the Act was not an abuse of discretion on the part of the Board and was supported by the evidence considered as a whole. *N. L. R. B. v. Mt. Clemens Metal Products Co.*, 287 F. (2) 790, 791, C. A. 6th; *N. L. R. B. v. Greenfield Components Corp.*, 317 F. (2) 85, 88, C. A. 1st; *N. L. R. B. v. Syracuse Stamping Co.*, 208 F. (2) 77, 79, C. A. 2nd.

The petition to set aside the order of the Board is denied. A decree enforcing the order of the Board will be entered.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed January 27, 1964.)

On petition to review and set aside an order of the National Labor Relations Board, and answer of the Board requesting enforcement of its order;

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, It is now ordered, adjudged and decreed by this Court that the petition to set aside the Board's order be and the same is denied, and a decree of enforcement is herewith entered.

No costs awarded. Rule 23(4).

Approved for entry:

/s/ SHACKELFORD MILLER, JR.
U. S. Circuit Judge.

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING.

(Filed March 2, 1964.)

The petition for rehearing filed by Keener Rubber, Inc., having been considered by the Court;

IT IS ORDERED that said petition for rehearing be denied.

Approved for entry:

/s/ SHACKELFORD MILLER, JR.
United States Circuit Judge.